United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

affidavit

75-4219

To be argued by
MARY P. MAGUIRE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4219

CHARALAMBOS PAPPAS and
LUELLA MAY PAPPAS,

Petitioners,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

B

P/S

BRIEF FOR RESPONDENT

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for Respondent.

MARY P. MAGUIRE,
THOMAS H. BELOTE,
Special Assistant United States Attorneys, Of Counsel.

2

TABLE OF CONTENTS

Page

Statement of the Case 1

Issues Presented 2

Statement of Facts. 2

Relevant Statutes 6, 7, 8

ARGUMENT:

POINT I - This Court lacks jurisdiction to review the deportation order entered against Luella May Pappas 9

POINT II - The denial of petitioner's application for a waiver of inadmissibility pursuant to Section 212(h) of the Act was not an abuse of discretion. 10

A. Adjustment of status pursuant to Section 245 of the Act, 8 U.S.C. §1255 10

B. The Board's denial of the alien's waiver application was a proper exercise of discretion. 12

C. The Record supports the Board's conclusion that the petitioner's application for adjustment of status did not merit the favorable exercise of discretion 16

CONCLUSION 17

TABLE OF CASES

Page

Chen v. Foley, 385 F.2d 929 (6th Cir. 1967), cert. denied, 393 U.S. 838 ( ) 11

Diric v. Immigration and Naturalization Service, 400 F.2d 658 (9th Cir. 1968), cert. denied, 394 U.S. 1015 (1969) 11

Gambino v. Immigration and Naturalization Service, 419 F.2d 1355 (2d Cir. 1970), cert. denied, 399 U.S. 905 ( ) 11

Li Cheung v. Esperdy, 377 F.2d 819 (2d Cir. 1967) . . 10

Luna-Benalcazar v. Immigration and Naturalization Service, 414 F.2d 254 (6th Cir. 1969) 10

Muscardin v. Immigration and Naturalization Service, 415 F.2d 865 (2d Cir. 1969). 15

Santos v. Immigration and Naturalization Service 335 F.2d 262 (9th Cir. 1967) 11

Schreiber v. Immigration and Naturalization Service, 461 F.2d 1078 (2d Cir. 1972). 15

Wa v. Immigration and Naturalization Service 407 F.2d 834 (1st Cir. 1969) 10

ADMINISTRATIVE DECISIONS CITED

Matter of Hwang, 10 I.& N. Dec. 448, 451 (BIA 1964) 14

Matter of W, 9 I. & N. Dec. 1 (BIA 1960). 14

STATEMENT OF THE CASE

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1105a(a), Charalambos Pappas and his wife, Luella May Pappas, concededly deportable aliens, petition this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on July 7, 1975. That order dismissed an appeal by the male petitioner from a decision of an Immigration Judge which found him deportable pursuant to Section 241(a)(9) of the Act, 8 U.S.C. §1251(a)(9), denied his application for adjustment of status under Section 245 of the Act, 8 U.S.C. §1255, denied his application for a waiver of inadmissibility pursuant to Section 212(h) of the Act, 8 U.S.C. §1182(h), and granted him the discretionary privilege of voluntary departure.

The petitioners filed this instant petition for review in this Court on October 6, 1975. Since that time they have enjoyed a stay of deportation by virtue of Section 106(a)(3) of the Act, 8 U.S.C. §1105a(a)(3).

ISSUES PRESENTED

(1) Whether this Court has jurisdiction to review the deportation order entered against Luella May Pappas.

(2) Whether the Board of Immigration Appeals abused its discretion in denying the applications of Charalambos Pappas for the waiver of inadmissibility provided for in Section 212(h) of the Act.

(3) Whether the Board erred in denying the application of petitioner Charalambos Pappas for adjustment of status pursuant to Section 245 of the Act.

STATEMENT OF FACTS

Charalambos Pappas

Petitioner Charalambos Pappas is a 42 year old alien, a native of Egypt and citizen of Canada. Prior to the entry of the final order of deportation which is before this Court for review, Pappas had been the subject of three other deportation proceedings. He

was granted the privilege of voluntary departure in lieu of deportation in 1955 and again in 1956, in both instances after he had been admitted as a crewman and then failed to depart with his ship. On March 31, 1970 he was again granted the privilege of voluntary departure in lieu of deportation.

Although it is difficult to reconstruct the periods of Pappas' illegal residence in the United States, it is apparent that from 1960 until the institution of the most recent deportation proceedings in 1972 he has illegally resided and been employed in the United States for extended periods of time in admittedly knowing violation of the immigration laws. During these periods his wife and two of his children, also illegal aliens, resided with him. A third child, a United States citizen, was born in the United States in 1965 during one of the periods of his parents' unlawful residence.

In addition to his violations of the immigration laws, Pappas has also been convicted of two

criminal violations. On October 29, 1958 he was convicted in Vancouver, Canada of an indecent act and was ordered to pay a $50. fine or serve twenty days. On March 26, 1971 he was arrested in a New York City subway station and charged with indecent exposure. He was convicted upon a guilty plea and received a conditional discharge.

On May 12, 1970 Pappas' mother, who is a naturalized United States citizen, filed a visa petition on behalf of her son to accord him status as fourth-preference immigrant pursuant to Section 203(a)(4) of the Act, 8 U.S.C. §1153(a)(4). The petition was approved on October 8, 1970 and forwarded to the United States Consulate at Montreal, Canada so that Pappas could process his visa application. Instead of doing so, however, Pappas returned to the United States and again resided and worked in violation of his nonimmigrant status.

On April 18, 1972 deportation proceedings were instituted against Pappas, who conceded deportability at a hearing held on May 10, 1972 and applied for adjustment of status pursuant to Section 245 of the Act,

8 U.S.C. §1255 together with a waiver of inadmissibility pursuant to Section 212(h) of the Act, 8 U.S.C. §1182(h). In a decision dated May 30, 1974 the Immigration Judge denied the application for adjustment of status and waiver of inadmissibility but granted Pappas the privilege of voluntary departure in lieu of deportation. The Immigration Judge also entered an alternate order of deportation to Canada in the event Pappas failed to depart voluntarily by the prescribed date.

Pappas appealed the decision of the Immigration Judge to the Board of Immigration Appeals and in a decision dated July 7, 1975 the Board dismissed the appeal. In so doing the Board found that Pappas had failed to establish the requisite extreme hardship for a waiver of inadmissibility. The Board also held that even if Pappas were eligible for adjustment of status his application should be denied in the exercise of discretion in view of his repeated violation of the immigration laws.

Luella May Pappas

Petitioner Luella May Pappas is a 45 year old native and citizen of Canada. She was admitted to the United States in September 1965 as a nonimmigrant visitor for pleasure. She failed to depart at the expiration of her authorized stay and on March 31, 1970 she was granted the privilege of voluntary departure with an alternate order of deportation to Canada if she failed to depart voluntarily.

She reentered the United States in April 1971 as a nonimmigrant and again failed to depart at the expiration of her authorized stay. Deportation proceedings were again instituted against her on November 27, 1972 and in a decision dated May 30, 1974 the Immigration Judge found her deportable as charged, granted her the privilege of voluntary departure and entered an alternate order of deportation to Canada in the event she failed to depart voluntarily. Mrs. Pappas did not appeal from the order of the Immigration Judge.

RELEVANT STATUTES

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 106, 8 U.S.C. §1105a

* * *

(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him or if he has departed from the United States after the issuance of that order * * *

Section 212, 8 U.S.C. §1182

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * *

(9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense), * * *

(h) Any alien, who is excludable from the United States under paragraphs (9), (10), or (12) of this section, who (A) is the spouse or child, including a minor unmarried adopted child, of a United States citizen, or of an alien unlawfully admitted for permanent residence, or (B) has a son or

daughter who is a United States citizen or an alien lawfully admitted for permanent residence, shall, if otherwise admissible, be issued a visa and admitted to the United States for permanent residence (1) if it shall be established to the satisfaction of the Attorney General that (A) the alien's exclusion would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, or son or daughter of such alien, and (B) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States; and (2) if the Attorney General, in his discretion, and pursuant to such terms, conditions, and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa and for admission to the United States.

* * *

Section 245, 8 U.S.C. §1255

(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

* * *

ARGUMENT

POINT I

THIS COURT LACKS JURISDICTION TO REVIEW THE DEPORTATION ORDER ENTERED AGAINST LUELLA MAY PAPPAS

This Court has jurisdiction under Section 106(a)(1) of the Act, 8 U.S.C. §1105a(a)(1) to review all final orders of deportation made pursuant to Section 242(b) of the Act, 8 U.S.C. §1252(b). However, Section 106(c) of the Act, 8 U.S.C. §1105a(c), provides that "an order of deportation . . . shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations . . ." Mrs. Pappas had the right, under 8 C.F.R. 242.21, to appeal the Immigration Judge's finding of deportability to the Board of Immigration Appeals. By not appealing, she failed to exhaust the administrative remedies which the statute requires before any court may grant a review. Accordingly, this Court lacks jurisdiction to review the

order of the Immigration Judge. Li Cheung v. Esperdy, 377 F.2d 819 (2d Cir. 1967); Wa v. Immigration and Naturalization Service, 407 F.2d 854 (1st Cir. 1969); Luna-Benalcazar v. Immigration and Naturalization Service, 414 F.2d 254 (6th Cir. 1969).

POINT II

THE DENIAL OF PETITIONER'S APPLICATION FOR A WAIVER OF INADMISSIBILITY PURSUANT TO SECTION 212(h) OF THE ACT WAS NOT AN ABUSE OF DISCRETION

A. Adjustment of status pursuant to Section 245 of the Act, 8 U.S.C. §1255.

Section 245 of the Act, 8 U.S.C. §1255, provides that the Attorney General, in his discretion, may adjust the status of an alien to that of a permanent resident provided the alien is eligible to receive an immigrant visa, is admissible to the United States and provided an immigrant visa is immediately available. Because this form of relief circumvents the usual immigration procedures, it is considered extraordinary

and will be granted only in meritorious cases. Chen v. Foley, 385 F.2d 929 (6th Cir. 1967), cert. denied, 393 U.S. 838 (1968).

In order for an alien to be eligible for consideration, he must first satisfy the substantive prerequisites contained in the statute. Having done so, he must then persuade the Attorney General to exercise his discretion favorably. Of course, if the alien fails to satisfy the statutory requirements, he will be ineligible for the relief sought and hence the exercise of discretion will never be reached. Diric v. Immigration and Naturalization Service, 400 F.2d 658 (9th Cir. 1968), cert. denied, 394 U.S. 1015 (1969); Gambino v. Immigration and Naturalization Service, 419 F.2d 1355 (2d Cir. 1970), cert. denied, 399 U.S. 905 (1970). Moreover, the burden is always upon the alien to establish that he is statutorily eligible for this relief and that his application merits the favorable exercise of discretion. Santos v. Immigration and Naturalization Service, 335 F.2d 262 (9th Cir. 1967).

Having examined the nature of the relief sought herein, we now turn to consider the evidence contained in the administrative record upon which the Board's decision was based.

B. The Board's denial of the alien's waiver application was a proper exercise of discretion.

The petitioner concedes that he has been convicted of two crimes which involve moral turpitude. He is, therefore, inadmissible to the United States under Section 212(a)(9) of the Act, 8 U.S.C. §1182(a)(9). Since such inadmissibility would render him statutorily ineligible for adjustment of status, petitioner applied for a waiver of the ground of inadmissibility pursuant to Section 212(h) of the Act. See 8 C.F.R. 243.1(f).

Section 212(h) of the Act was made part of the Act in 1961 in order to mitigate hardships resulting from exclusions on criminal grounds. Section 212(h) authorizes the Attorney General, in his discretion, to waive excludability and permit entry for permanent residence in

the case of an alien excludable on criminal grounds who is the spouse, child or parent of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the alien's expulsion would result in extreme hardship to the American citizen or resident alien, and that his admission would not be detrimental to the national interest.

As the parent of a United States citizen and the son of a United States citizen, Pappas has the requisite familial relationship to seek a waiver under Section 212(h). However, in order to obtain the waiver he must show that his exclusion from the United States would result in extreme hardship to his United States citizen child or to his United States citizen parent. The language "would result in extreme hardship" which appears in Section 212(h) is also found in Section 244(a)(1) of the Act. The Board of Immigration Appeals has said that "The personal privation contemplated in a situation characterized by 'extreme hardship' within the meaning

of Section 244(a)(1) is not a definable term of fixed and inflexible content or meaning. It necessarily depends upon the facts and circumstances peculiar to each case." Matter of Hwang, 10 I.& N. Dec. 448, 451 (BIA 1964). The Board has also interpreted the term "extreme hardship" as used in section 5 of the 1957 Act (Public Law 85-316), the predecessor of section 212(h) of the amended 1952 Act to mean more than the existence of mere hardship caused by family separation. Matter of W, 9 I. & N. Dec. 1 (BIA 1960).

It is submitted that the Board clearly applied the proper standard in determining the petitioner's waiver application. Petitioner contends that petitioner's citizen son "would be uprooted from school in the United States and forced to live in a foriegn country." He further contends that he, together with his two brothers, contribute to the support of his citizen mother and that his close relationship with her would suffer if he were excluded. Pappas' contentions are really to the effect that his expulsion would involve emotional strain and

economic hardship. Such factors, although unfortunate, are not controlling in assessing the degree of hardship. The record is barren of any evidence demonstrating any outstanding equities in favor of this petitioner or showing that his deportation would result in an extreme hardship as that term is used in Section 212(h) of the Act. While petitioner refers to his son's education and his mother's financial support, the record does not sufficiently reflect facts that would support his contention that, in his situation, these factors establish a case of extreme hardship.

The sole issue before this Court is whether the Board abused its discretionary authority by denying petitioner's waiver application. The scope of review of the Board's decision by this Court is extremely narrow and the Board's decision should not be overturned unless there has been a clear abuse of discretion. Schreiber v. Immigration and Naturalization Service, 461 F.2d 1078 (2d Cir. 1972); Muskardin v. Immigration and Naturalization Service, 415 F.2d 865 (2d Cir. 1969).

C. The record supports the Board's conclusion that the petitioner's application for adjustment of status did not merit the favorable exercise of discretion.

Although the Board found that petitioner was not entitled to the waiver sought under Section 212(h) and therefore not eligible for adjustment of status pursuant to Section 245 of the Act, the Board went on to state that even if the petitioner were eligible for adjustment of status the application should be denied in the exercise of discretion. It is submitted that the Board's conclusion is amply supported by the record. Petitioner has been the subject of three prior deportation proceedings. On each occasion he apparently exercised the privilege of voluntary departure which was granted to him only to almost immediately reenter the United States to resume his illegal residence and unauthorized employment. The transcript of the deportation hearing indicates that petitioner was somewhat less than candid with the Immigration Judge with respect to his periods of residence and employment in the United States as well as with respect to his criminal record. Where, upon review of the entire

record, the evidence reflects that the petitioner has a long and continued pattern of violating the immigration laws and has been less than candid in his testimony, the denial of his application for adjustment of status would be a proper exercise of discretion.

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the
Southern District of New York,
Attorney for Respondent.

MARY P. M[illegible]IRE,
THOMAS H. BELOTE,
Special Assistant United States Attorneys,
Of Counsel.

Form 280 A-Affidavit of Service by Mail
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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA 75-4219

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

13th day of February, 19 76 she served a copy of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Barst & Mukamal, Esqs.,
127 John St.
NY NY 10038

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

13th day of February, 19 76

Joseph P. Lee

JOSEPH P. LEE
Notary Public, State of New York
No. 31-4504600, Queens County
Term Expires March 30, 1977